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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,

Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an employer's subjective perception that an "unforeseeable business circumstance" required the closing of its business can enable that employer to escape liability, pursuant to 29 U.S.C. § 2102 (1988), for failing to provide its employees with the 60 days advance notice required under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (1988).

Whether an employer may claim that it was uninformed of its own financial status, when critical information was available within the employer's own business records, as a defense under 29 U.S.C. § 2102 (1988), after it failed to provide the 60 days notice required prior to closing the business under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (1988).

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OPINIONS BELOW

The October 14, 1993, opinion of the United States Court of Appeals for the Seventh Circuit is reported. *Jurcev v. Central Community Hosp.*, 7 F.3d 618 (7th Cir. 1993). A copy of that opinion is contained in the attached Appendix, beginning at page 1a.

The written opinion of the District Court dated May 5, 1992, is not reported. A copy of that opinion is contained in the attached Appendix, beginning at page 22a.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was rendered on October 14, 1993.

On December 30, 1993, Petitioners filed in this Court an Application to Extend Time to File Petition for Writ of Certiorari. On January 4, 1994, Associate Justice John Paul Stevens signed an Order extending the time for filing a Petition for Writ of Certiorari to February 11, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), are set out in the attached Appendix, beginning at page 71a.

STATEMENT OF THE CASE

Petitioner Central Community Hospital (the Hospital), located in Chicago, Illinois, closed on March 14, 1990 without providing Hospital employees with the 60 day notice [1] required by the Worker Adjustment Retraining and Notification (WARN) Act. 29 U.S.C. §§ 2101-2109 (1988). This case raises the question whether the Hospital may be permitted to evade Congress' mandate that employers provide such notice before closing by resort to the "unforeseeable business circumstance" defense available under the WARN Act. 29 U.S.C. § 2102(b)(2)(A).

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[1] There has been some dispute between the parties concerning the precise date that effective notice of the Hospital's closing was given to its employees. For present purposes that debate is irrelevant because, even accepting the Hospital's version of the events preceding the closing, it is clear that the required 60 days notice was not provided.

1. *The Creation of the Foundation*

The Hospital was a not-for-profit corporation organized under the laws of the State of Illinois and exempt from income taxes under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1988) (App. 3a). As of 1983, the Hospital was a soundly capitalized institution, fully capable of satisfying all of its financial obligations. The Hospital's financial independence was modified, however, when the Hospital itself created and funded the Central Community Foundation ("the Foundation") (App. 3a).

The Foundation [2] is an Illinois not-for-profit corporation which was incorporated on December 20, 1983 (App. 3a). The Foundation was formed pursuant to a December 23, 1983 resolution of the Hospital's Board of Trustees, as a "support foundation" for the Hospital under 26 U.S.C. §§ 501(c)(3) and 509(a)(3) of the Internal Revenue Code (App. 3a). The resolution creating the Foundation provided that the Foundation was "to be operated, supervised and controlled by or in connection with the Hospital, for the purposes of conducting or supporting activities for the benefit of . . . the Hospital" (App. 33a).

The Foundation's Articles of Incorporation also provided that it was to be operated exclusively for the benefit of or to carry out the purposes of the Hospital (App. 3-4a). To accomplish these purposes, the Articles of Incorporation expressly empowered the Foundation to receive assets in any form and "to use, apply, invest and reinvest the principal and/or income therefrom or dis-

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[2] On June 18, 1990 the District Court allowed Plaintiffs to file an Amended Complaint against the Prairie Foundation, formerly Central Community Foundation, as a Defendant. The District Court granted the Hospital's motion for summary judgment on March 6, 1992, and modified its order on March 20, 1992 to include the dismissal of the complaint against the Foundation. However, the Plaintiffs never served Central Community Foundation with process and so the Foundation did not file an appearance or pleading in the case (App. 7a).

tribute the same" for these specified purposes (App. 3-4a). Thus, at the time its Articles of Incorporation were written, the Foundation was authorized to use both interest and principal to support the Hospital.

As created, the Foundation was to be administered by four trustees, each of whom was to be appointed by the Hospital, and each of whom was also a member of the nine person Hospital Board of Trustees (App. 3a). At all times relevant to this case, Sherwin Stone served as President and Trustee of the Foundation (App. 32a) and served as general counsel for both the Hospital and the Foundation (App. 33a). The remaining three trustees and officers of the Foundation were Patrick A. DeMoon, Patrick S. DeMoon and Dr. Algirdas Maciunas (App. 3a).

On June 7, 1984, the Foundation filed with the Internal Revenue Service ("I.R.S.") an Application for Recognition of Exemption ("Application") under § 501 (c)(3) of the Internal Revenue Code (App. 34a). Attached to the Application were the Foundation's Articles of Incorporation which expressly authorized distribution of principal to support the Hospital (App. 61a). The Application vertified that the Foundation was to be controlled by the Hospital through the annual appointment of the Foundation's Trustees.

One of the questions contained in the Application required the Foundation to indicate whether it intended to use its assets as an endowment fund. In response to this question, the Foundation represented:

> The Foundation plans to utilize all assets received by it from the supported organization as an endowment fund to produce income for support of the Foundation's exempt activities and to give financial support to the 501(c)(3) organization.

(App. 35a).

According to testimony later elicited in this case, the Foundation consciously used the word "income" in responding to this question in the Application, thereby limiting the amounts which it could distribute to the Hospital to the income generated by the Foundation, not the principal (App. 35a). The Foundation took this step on the basis of advice provided by its accounting firm which suggested that such a limitation might increase the chances that the I.R.S. would grant the Foundation tax exempt status.

On December 17, 1984, the I.R.S. issued a determination letter that the Foundation would be exempt from taxes "assuming that [its] operations will be as stated in the Application," and classified the Foundation as a "support organization" under the provisions of § 509(a)(3) of the Internal Revenue Code (App. 4a, 36a). The December 17, 1984 letter also provided the name and telephone number of a contact person at the I.R.S. if any questions arose concerning the exemption ruling (App. 36a).

On December 20, 1984 the Hospital's Board of Trustees unanimously approved the transfer of the Hospital's investment portfolio to the Foundation. The Hospital transferred to the Foundation assets valued at over $19,000,000.00 (App. 4a, 37a).

Very shortly after these events in December 1984, Sherwin Stone had a conversation with Dr. Algirdas Maciunas, who was also an officer and Board of Trustees member of both entities. During that conversation Mr. Stone advised Mr. Maciunas that any distribution of money from the Foundation to the Hospital had to come from the Foundation's income, not from principal (App. 41a).

Between November 4, 1985 and January 22, 1990, the Foundation made the following unrestricted subventions to the Hospital totalling nearly $12,000,000.00:

November 4, 1985	—	$ 250,000.00
February 24, 1986	—	$ 100,000.00
December 3, 1986	—	$1,000,000.00
January 27, 1987	—	$1,000,000.00
June 27, 1987	—	$1,000,000.00
November 26, 1987	—	$1,000,000.00
January 15, 1988	—	$ 600,000.00
April 15, 1988	—	$1,000,000.00
August 11, 1988	—	$1,000,000.00
November 8, 1988	—	$1,000,000.00
March 2, 1989	—	$1,000,000.00
June 29, 1989	—	$1,000,000.00
October 18, 1989	—	$1,000,000.00
January 22, 1990	—	$1,000,000.00

(App. 38a).

The consistent subvention of large sums of money beginning in December 1986 was due to the fact that, during this period of time, the Hospital was operating at a substantial loss (App. 16a, 38a). Thus, from 1986 through 1990, the Hospital had to rely on the subventions from the Foundation, which provided cash to the Hospital on an "as needed" basis.

2. *The Decision to Close the Hospital*

Not until the Foundation's eleventh $1,000,000.00 subvention to the Hospital on January 22, 1990, did any officer of either the Hospital or Foundation ascertain whether the frequent and large subventions were invading the principal. According to the Respondents, Sherwin Stone became concerned subsequent to the January 22, 1990 subvention about the frequency and amount of these distributions (App. 63a). Mr. Stone asked the Hospital's Comptroller, Harold Reisler, to prepare a summary of the subventions made by the Foundation and to calculate all income the Foundation had earned. In February 1990, Mr. Stone received this information and learned that the October 18, 1989, and January 22, 1990, subventions

had exceeded the Foundation's cumulative earnings (App. 64a).

Despite having received annual audited financial statements for the Hospital and Foundation (App. 40a) Mr. Stone claimed that he learned for the first time in February 1990 that the subventions to the Hospital had invaded the Foundation's principal (App. 4a). However, Mr. Reisler, the Hospital's comptroller, who also performed all of the internal accounting for the Foundation, was aware that the Foundation's distribution had invaded principal at the time the October 18, 1989, subvention of $1,000,000.00 was made (App. 16-17, 40a).

Mr. Stone reviewed the Foundation's Application to the I.R.S. and became concerned that the invasion of the Foundation's principal might violate the conditions under which it obtained its tax exempt status. As a result, he convened a special meeting of the Hospital's Board of Trustees on February 19, 1990, at which time he advised the Trustees that the Foundation might be precluded from making any further distributions to the Hospital in excess of the Foundation's income. Mr. Stone further advised the Hospital's Trustees that the legal consequences of the invasion of principal would be researched (App. 24a).

That same day, Mr. Stone held a meeting with two attorneys in his law firm. Mr. Stone directed an associate to prepare a memorandum regarding the possible legal implications for the Foundation of the invasion of principal (App. 24a).

After several hours of research on the legal issues involved, Mr. Stone's associate drafted a two page memorandum which began with the warning that it should not be considered to include definitive legal or tax advice (App. 45a). This memorandum speculated that it was "possible" that use of the principal could affect the Foundation's tax exempt status (App. 45a). Nevertheless, the

memorandum concluded that "it was unlikely that the Foundation would lose its exempt status" (App. 45a). Despite this conclusion, the memorandum suggested that a conservative course be taken and recommended that the Foundation make no further subventions until a ruling on the effect of the invasion of principal could be obtained from the I.R.S. The memorandum estimated that such a process could take "a number of months." *Id.*

Mr. Stone also telephoned Thomas Trabon, a partner in the accounting firm which served the Foundation, and advised him of possible concerns involving the Hospital's continued use of principal to support the Hospital (App. 46a). According to Mr. Stone, Mr. Trabon indicated that the Foundation would be taking a chance with its exempt status if it did not conform to the terms of its exemption (App. 25a, 46a).

The Foundation's Trustees met on February 26, 1990. At that meeting Mr. Stone advised the other three Trustees of the legal memorandum prepared by his associate and his conversation with Mr. Trabon. Based on Mr. Stone's advice, the Foundation's Trustees voted to suspend making subventions to the Hospital until any of three conditions were satisfied: either the Hospital repaid the amount of principal invaded by the October 1989 and January 1990 subventions, the Foundation earned sufficient monies to offset the depleted principal, or the Foundation received a definitive ruling from the I.R.S. permitting the payment of principal to the Hospital (App. 25a).

Immediately after the meeting of the Foundation's Board of Trustees, the Board of Trustees of the Hospital met. At that meeting, Mr. Stone announced that, subject to the three conditions established by the Foundation's Board, the Foundation would not make any further subventions (App. 25a). P. S. DeMoon, one of the four individuals who was a Trustee for both the Foundation and the Hospital, advised the Trustees that the Hospital

did not have the resources to wait for a ruling from the I.R.S. Rather, Mr. DeMoon informed the Trustees that the Hospital had only enough cash on hand plus anticipated cash receipts to keep the Hospital open only for approximately two weeks (App. 25a).

The Hospital's Trustees voted to close the Hospital effective March 14, 1990, the date the Hospital's cash was projected to run out (App. 25a). On that date the Hospital closed without giving the 60 days written notice to its employees required by the WARN Act. All of the Hospital's employees were terminated on that date (App. 25a) except for a limited number of security, custodial and administrative employees who were retained to conclude the Hospital's affairs (App. 52a).

3. *The Proceedings Below*

On March 28, 1990, Petitioners, employees who lost their jobs when the Hospital closed, filed this class action [3] against the Hospital.[4] Following discovery, the Hospital filed a motion for summary judgment. In its motion, the Hospital conceded that the WARN Act applied to the Petitioners and further acknowledged that it did not provide the requisite notice mandated by that Act. The Hospital claimed, however, that the WARN Act's 60 day notice requirement did not apply pursuant to 29 U.S.C. § 2102(b)(2)(A), which reduces the notification period where a plant closing "is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

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[3] The district court granted Plaintiffs' motion for class certification on August 16, 1990.

[4] In their complaint, Petitioners alleged violations of the WARN Act as well as two claims based on Illinois law. The jurisdiction of the district court was premised on 28 U.S.C. § 1331 (1988) as to the WARN Act claim and on the doctrine of pendent jurisdiction with respect to the state law claims.

On May 5, 1992, the District Court issued a Memorandum Opinion and Order granting summary judgment to the Hospital on the WARN Act claim and dismissing Petitioner's pendent state law claims (App. 22a). The District Court, while acknowledging that the Respondents had failed to give the required notice mandated by the WARN Act,[5] held that the Hospital had established that the circumstances which caused the closing of the Hospital were not "reasonably forseeable" as a matter of law.

Petitioners appealed that decision to the United States Court of Appeals for the Seventh Circuit, which, on October 14, 1993, issued an opinion affirming the District Court's ruling (App. 1a).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT IN CONCLUDING THAT THE CLOSING OF THE HOSPITAL WAS CAUSED BY BUSINESS CIRCUMSTANCES THAT WERE NOT REASONABLY FORESEEABLE.

This case concerns an important question of first impression regarding the proper interpretation of the WARN Act.

The decisions below are premised on an erroneous application of the exception contained in 29 U.S.C. § 2102 (a)(1) of the WARN Act which mandates that an employer "shall not order a plant closing or mass layoff until the end of a sixty-day period after the employer serves written notice of such an order . . . to each affected employee." (App. 71a). The issue presented in this case involves the exception to the 60 day notice requirement

[5] The District Court held that "[T]here is no dispute here that on February 26, 1990, there was a "plant closing" due to the Hospital's closure, or that the plaintiffs were "affected employees" or that the employees suffered an "employment loss" under the Act. And the defendants obviously are not contending that they provided 60-day notice as the WARN Act requires." (App. 26a).

contained in 29 U.S.C. § 2102(b)(2)(A). This provision states:

> An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably forseeable as of the time that notice would have been required.

(App. 72a).

The courts below erred by accepting the Hospital's subjective viewpoint that the Foundation's decision to suspend subventions was unexpected. The issue presented by this subsection is not whether the circumstances which led to the Hospital's closing were sudden, dramatic or unexpected from the standpoint of the Hospital's Trustees, but whether these circumstances should have been sudden, dramatic or unexpected to the Hospital.

The Seventh Circuit's decision in this case raises significant concerns regarding future litigation under the WARN Act. The WARN Act is, by its very nature, implicated by far reaching employment decisions—plant closing or mass layoffs—which are, in most cases the product of changing "business circumstances."[6] If an employer can, through inattentiveness, inactivity or ignorance of relevant facts, help create the exigent circumstances which lead to a plant closing or mass layoff, the exception specified in 29 U.S.C. § 2102(b)(2)(A) of the Act would substantially limit the scope of the WARN Act, despite Congressional intent to the contrary.

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[6] The Department of Labor's Bureau of Labor Statistics has released data that indicates that "1.9 million adult workers (those 20 and older) lost full-time jobs, on average, each year between 1981 and 1988 because their employers closed or relocated, because their position or shift was eliminated, or because of slack work." Staff of Committee on Ways and Means, 102d Cong., 2d Sess., *1992 Green Book: Overview of Entitlement Programs*, at 553, 562 (1992).

A. Courts Must Use An Objective Standard When Assessing Whether Business Circumstances Are "Unforseeable" For Purposes Of The WARN Act.

In analyzing the scope of the "unforseeable business circumstance" exception, the regulations promulgated by the Department of Labor provides an appropriate beginning point.[7] The Secretary of Labor has indicated that "[t]he employer bears the burden of proof that conditions for the exceptions [stated in § 2102(b)] have been met." 20 C.F.R. § 639.9 (1993). The Department of Labor's regulations provide the following guidance:

> An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some *sudden, dramatic, and unexpected action or condition outside the employer's control.* A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

20 C.F.R. § 639.9(b)(1) (emphasis added).

The language thus clearly suggests that the defense applies only to circumstances that are extraordinary and

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[7] These regulations have been issued pursuant to the explicit authority granted by Congress in 29 U.S.C. § 2107, which provides that the Secretary of Labor "shall prescribe such regulations as may be necessary to carry out this chapter." Based on the express grant of power to the Secretary of Labor in § 2107, at least two courts have concluded that the Department of Labor's WARN Act regulations constitute substantive rules which have "the force and effect of law," based on the principles announced by this Court in such cases as *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979). *See Finkler v. Elsinore Shore Assoc.*, 781 F. Supp. 1060, 1064 (D.N.J. 1992); *Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 778 F. Supp. 297, 307, n.12 (E.D. La. 1991).

unpredictable, and thus, are not reasonably forseeable. *Compare Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 778 F. Supp. 297 (E.D. La. 1991) and *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1288 (E.D. Tenn. 1990) *with Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326, 332 (C.D. Cal. 1993)* and *International Ass'n. of Machinists & Aerospace Workers v. General Dynamics*, 821 F. Supp. 1306, 1312 (E.D. Mo. 1993).

The regulations promulgated by the Department of Labor confirm a fact which is implicit in Congress' use of the words "reasonably foreseeable" in § 2102(b)(2)(A) —the scope of this exception to the WARN Act is to be assessed on the basis of an objective standard, measured by reasonable commercial conduct:

> The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.

20 C.F.R. § 639.9(b)(2).

The regulations thus ". . . provide an objective test by focusing on the commercial reasonableness of the employer's actions." 54 Fed. Reg. 16062 (1989), *reprinted in* Legislative History of the Worker Adjustment and Retraining Notification Act, 1988, at 53 (1990). *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1288 (E.D. Tenn. 1990) (defendants' subjective belief regarding business circumstances "is not relevant" to the duty to give notice.").

Had Congress intended a subjective test, it could have accomplished that result easily by providing for an exception to the WARN Act for business circumstances not *foreseen* by the employer. The use of the word "fore-

seeable" refutes any suggestion that the subjective view of an employer controls on this question. This fact is reinforced by the requirement that the business circumstances not be *reasonably* foreseeable. As the Department of Labor regulations have noted, reasonable foreseeability compels reference to a standard of conduct quite removed from the subjective knowledge of the employer.

B. The Seventh Circuit Committed Reversible Error By Deferring To The Defendants Subjective Belief That The Circumstances Which Led To The Hospital's Closing Were Not Reasonably Forseeable.

In ruling that summary judgment in favor of the Hospital was appropriate, the Seventh Circuit seriously misconstrued the legal standard provided in 29 U.S.C. § 2102 (b)(2)(A) and the Secretary of Labor's regulations. The Seventh Circuit came to the conclusion that the business conditions which necessitated the closing of the Hospital were not reasonably foreseeable based on the subjective knowledge and appreciation of these conditions by the members of the Hospital's Board of Trustees. The Seventh Circuit stated in its opinion:

> Seven members of the Hospital's Board of Trustees testified during their depositions that they did not know of the Foundation's decision to discontinue taking subventions until February 26, 1990, . . . And it was not until late February of 1990 that anyone on either Board became aware that dipping into principal to make the subventions might have violated the terms of the Internal Revenue Service's grant of tax-exempt status to the Foundation.

7 F.3d at 626 (App. 15a).

Thus, according to the Seventh Circuit, because the Hospital's Trustees did not (subjectively) know of the Foundation's decision to cease making subventions until late February 1990, the Hospital could invoke the exception contained in 29 U.S.C. § 2102(b)(2)(A). There is

a fundamental legal error in the Seventh Circuit's analysis of this question. For, even assuming that the Trustees of the Hospital and the Foundation had no subjective knowledge of the economic circumstances which led to the Hospital's failure until February 1990, such proof fails to address the central question presented by the exception to the WARN Act—whether their lack of knowledge was, from an objective standpoint, "reasonably foreseeable."

In 1984, the Hospital placed its financial future in the hands of another entity when it transferred assets in excess of $19,000,000 to the Foundation. Over the years which followed, the Foundation's unrestricted subventions to the Hospital became extremely large and took on increasing importance for the Hospital. From November 1985 through January 1990, the Foundation distributed nearly $12,000,000.00 to the Hospital (App. 38a). Moreover, from December 1986 through January 1990 the Foundation distributed money to the Hospital on the average of once every three months, almost always in the amount of $1,000,000.00. These subventions were critically important for the Hospital's continuing operation since the Hospital sustained deficits of approximately $3,000,000.00 during its 1988 and 1989 fiscal years (App. 13a). As the Respondent described with perhaps some degree of understatement in its brief to the Seventh Circuit, the multi-million dollar losses which the Hospital experienced in 1987, 1988 and 1989, "although troubling, were not a matter of life and death because the Foundation always provided cash when the Hospital needed it." Appellee's Brief at 20.

While the multi-million dollar losses were not, in and of themselves, a matter of life and death for the Hospital, the continued flow of money from the Foundation to the Hospital undoubtedly constituted a "life and death" situation for the Hospital. Thus, judged on a commercially reasonable standard, it was absolutely essential that the

Trustees of the Hospital take all steps necessary to see that the subventions from the Foundation continued without interruption. Instead, the Hospital and its Trustees did nothing.

The "reasonable foreseeability" standard provided in § 2102(b)(2)(A) is, of course, identical to a concept which has been applied in tort law with great frequency. It would appear, therefore, that reference to tort law concepts might be instructive in interpreting this provision. One such tort concept was discussed by this Court in *Urie v. Thompson*, 337 U.S. 163, 179 (1949): "Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect", *quoting Sadowski v. Long Island R. Co.*, 292 N.Y. 448, 55 NE.2d 497 (1944). Stated differently, the amount of ordinary care required under the circumstances—*i.e.* the reasonableness of particular conduct—is a function of the seriousness of the possible consequences. Thus, as applied to this case, the reasonable business judgment exercised by the Hospital and its Trustees must be gauged in light of the overwhelming importance that the Foundation's subventions had taken on for the Hospital's continuing existence.

The Hospital and its Trustees did nothing, despite the fact that they knew or should have known a number of essential facts. They knew or should have known that the Foundation was originally endowed with approximately $19,000,000.00. They knew or should have known that the Hospital's financial condition was deteriorating. They knew or should have known that the Foundation was supplying millions of dollars to the Hospital through frequent subventions. They knew or should have known that the frequency and magnitude of these subventions would eventually deplete the earning capacity of the Foundation's corpus. But, most important of all, the Hospital and its Trustees knew or should have known that future subventions from the Foundation to the Hos-

pital were jeopardized if the Foundation's principal was touched.

At least two of the Hospital's Trustees and officers had *actual* knowledge that the Foundation could not make subventions from principal (App. 41a). Irrespective of the subjective knowledge of the Trustees of the Hospital, in the exercise of commercially reasonable conduct, they should have known that there was some doubt whether subventions would come from the Foundation's principal. The Hospital and its Trustees should have known that the Foundation's Application to the I.R.S. for tax exempt status consciously limited future distribution to income only. The Hospital and its Trustees should have known that this limitation had been incorporated into the Foundation's Application on the advice of the Foundation's accountants. Thus, as early as 1984, the Hospital and its Trustees should have known that the Foundation's assets had to be maintained closely to avoid dipping into its principal.

In the face of what the Hospital and its Trustees actually knew or should have known, they did nothing. And, when the Hospital's Trustees belatedly reacted, it was far too late to save the Hospital from closure, and even too late to provide the 60-day notice mandated by the WARN Act.

Although the Seventh Circuit premised its holding on the fact that it was not until late February 1990 that any member of either Board became aware of the fact that invading the Foundation's principal might jeopardize the Foundation's tax exempt status, 7 F.3d at 626, the evidence indicated that the Foundation, in drafting its 1985 Application seeking tax exempt status, consciously drafted that document to limit its right to distribute income only (App. 34a). Thus, it was known at the time the Foundation submitted its Application that its ability to assist the hospital financially may have been limited to the income generated by the Foundation, not its princi-

pal. Given these facts, the courts below should have examined whether it was "commercially reasonable" for an employer to allow huge and repeat subventions without anticipating the time when the subventions would invade principal and thus jeopardize the tax-exempt status of the corporation and its very life.

Nonetheless, the Seventh Circuit deferred to the Respondent's subjective belief that it was "commercially reasonable" to remain totally ignorant of a critical limitation placed on what, for the Hospital, was an essential source of funds.

Thus, "reasonable" business judgment would dictate that the Trustees of the Hospital do everything possible to guarantee the continuation of a source of income which had become absolutely essential to the Hospital's existence. Reasonable business judgment would dictate that when the Hospital transferred over $19,000,000.00 in assets to the Foundation that the Hospital's Trustees have a complete understanding of the terms under which those assets would flow back to the Hospital. Yet it was not until February 1990, years after the Hospital had been demanding subventions in excess of $3,000,000.00 a year, that anyone sought to determine the tax ramifications of the Foundation's invasions of principal. At that point, according to the Defendant, it was too late to do anything but shut down the Hospital.

Thus, the fundamental error in the Seventh Circuit's decision in this case is in its reliance on what the Hospital and its Trustees were subjectively aware of, instead of what they should reasonably have been aware of.

Finally, the Seventh Circuit made one other serious error. There was a legitimately important question of whether the invasion of principal legally jeopardized the Hospital's tax exemption. Yet, in applying a subjective test, the Court accepted this key premise of the Respondents, without ascertaining if this premise was the result of "commercially reasonable" business judgment.

II. THE SEVENTH CIRCUIT'S BROAD INTERPRETATION OF THE "FORSEEABILITY" DEFENSE FAILED TO RECOGNIZE THE DOCTRINE OF IMPUTED CORPORATE KNOWLEDGE.

There is another serious error in the decision rendered by the Seventh Circuit which should be examined by this Court. The decision exempted the Hospital from all responsibility for knowledge of its own financial status, despite compelling evidence that critical information was in fact available trustees of both the Hospital and the Foundation at all times since the creation of the Foundation.

The uncontradicted evidence in this case demonstrated that Sherwin Stone and Dr. Algirdas Maciunas, both Trustees of the Hospital, were aware as ear'y as December of 1984, that the Foundation's subventions were not to invade principal. Nonetheless, the Seventh Circuit concluded that the Hospital did not know or have reason to know, until February 1990, that the Foundation had invaded principal. 7 F.3d at 627 (App. 16a). The Seventh Circuit reached this conclusion after rejecting Petitioner's arguments that the Comptroller's prior knowledge of the invasion of principal was changeable to the Hospital:

> True, the Hospital's comptroller, who maintained both the Hospital's and the Foundation's financial records, was aware of the invasion of principal from the inception of the practice. But he never told anyone because he was under the impression that it was alright to invade principal. Because he thought that it was proper for the Foundation to use any monies in the endowment fund for the subventions, including principal, he did not expect the Foundation to decide to stop making subventions because of the invasions of principal.

7 F.3d at 626 (App. 16-17a).

The Seventh Circuit's disposition of this aspect of the case raises a serious question of how knowledge is to be imputed to a corporation.

It is a well established principal of law that a corporation is charged with knowledge of all material facts which one of its agents acquires while acting in the scope of employment. 3 *Fletcher Cyc. Corp.* § 790 (Perm. Ed.). Moreover, this principle of imputed corporate knowledge applies "even though the officer or agent does not in fact communicate the knowledge to the corporation." *Id.*

A corollary of this doctrine of imputed corporate knowledge is that a corporation's "knowledge" represents the cumulative knowledge of information obtained by all of its agents in the course of their employment. *United States v. Osorio,* 929 F.2d 753, 761 (1st Cir. 1991); *Inland Freight Lines v. United States,* 191 F.2d 313, 315 (10th Cir. 1951); *United States v. T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730, 738 (W.D.Va. 1974). As recognized by the First Circuit in *United States v. Bank of New England N.A.,* 821 F.2d 844 (1st Cir. 1987), *cert. denied,* 484 U.S. 943 (1987):

> Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. (citation omitted). Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. *The aggregate of those components constitutes the corporation's knowledge of a particular operation.* It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:
>
> > [*A*] *corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full*

> *import.* Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

Id. at 856, *quoting United States v. T.I.M.E.-D.C., Inc., supra* (emphasis added).

The Seventh Circuit's decision is directly at odds with the First Circuit's holding in *Bank of New England.* The Seventh Circuit held that a corporation is not to be construed as having knowledge of a particular fact because the agent who possessed that knowledge was not aware of its significance, and failed to share that knowledge with other corporate agents who could grasp its significance.

The decision rejecting the Comptroller's evidence is erroneous in two respects. First, the Comptroller's knowledge of prior subventions from principal must be imputed to the Hospital, regardless of whether he shared that knowledge with any of the Hospital's agents. Second, by suggesting that the Hospital is not to be charged with the Comptroller's knowledge because that individual did not understand the significance of the information he possessed, opens up the prospect of corporate "immunity" by means of the compartmentalization of knowledge which the First Circuit warned against in *Bank of New England, supra.*

III. THE IMPORTANCE OF THE CASE.

By applying a subjective standard to the concept of forseeability, and by ignoring the doctrine of imputed corporate knowledge, the holding of the Seventh Circuit has far reaching ramifications for all WARN Act litigation.

Since the passage of the WARN Act, thousands of workers have gained advance notice of their layoffs. As the first federal law requiring any notice of plant closings and mass layoffs, Congress took a significant step in providing protection to those about to become dislocated workers. Reports issued by the Economic Policy Institute

and the National Academy of Science, and cited by members of Congress during debate on the bill,[8] all document the economic and psychological benefits of advance notice to workers who are displaced, and to the nation, by reducing the average duration of unemployment and lessening the public costs of such unemployment. For example, Representative Kildee observed that:

> The highly respected Economic Policy Institute found that advance notice requirements would reduce the period of joblessness by almost 4 weeks, would save $400 million in unemployment insurance costs, and would provide $1.5 billion in earnings to displaced workers. The report also cited a number of current studies by the Office of Technology Assessment and the National Academy of Sciences that failed to find evidence of substantial harm to business.[9]

Congress intended the WARN Act to be a broad, remedial statute. *Solberg v. Inline Corp.*, 740 F. Supp. 680, 684-85 (D. Minn. 1990). Yet, many workers who lose their jobs because of a closure or layoff still do not receive advance notice. The General Accounting Office, who conducted a study of employer compliance with the WARN Act in 1993 found: "Even when events appeared to us to meet the WARN criteria, our study showed that many employers did not provide notice." [10] By expanding

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[8] 134 Cong. Rec. S8454, S8472 (daily ed. June 23, 1988) (statement of Sen. Metzenbaum and Sen. Conrad); 134 Cong. Rec. S8543 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum); 134 Cong. Rec. S4548 (daily ed. April 22, 1988) (statement of Sen. Metzenbaum); 133 Cong. Rec. S9392 (daily ed. July 8, 1987) (statement of Sen. Kennedy), *reprinted in* Legislative History of the Worker Adjustment Retraining Notification Act, 1988, at 203, 204, 222, 251, 509, 686 (1990).

[9] 134 Cong. Rec. H5516 (daily ed. July 13, 1988) (statement of Rep. Kildee), *reprinted in* Legislative History of the Worker Adjustment Retraining Notification Act, 1988, at 168 (1990).

[10] *Dislocated Workers: Implementation of the Workers Adjustment and Retraining Notification Act (Warn) Before the Senate Subcommittee on Labor, Committee on Labor and Human Resources*, February 23, 1993 (Statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division).

the "unforseeable business circumstance" exception far beyond the intent of Congress, the results will be far worse. The Seventh Circuit has substantially lightened the burden on employers and the effect of this decision, if left standing, will be to fundamentally restructure the WARN Act and weaken its protections against workers facing imminent job loss.

CONCLUSION

Based on the foregoing, Petitioners, Myrna Jurcev, Stanley Miller, Florence Moore, Rosemary Riordorn and Dr. Cosette Z. Villanaeva, respectfully request that the Court issue a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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